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Private Law: Property

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PROPERTY

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PUBLIC THINGS

The legal status of *artificial* navigable waterways has not been sufficiently explored in Louisiana jurisprudence and doctrine. The central issue is whether an artificial navigation canal is necessarily a public thing, either in the sense that it is a part of the public domain or in the sense that it is burdened with a servitude of public use. It would seem that "a canal built entirely on private property for private purposes is a private thing, for the same reasons that a road built on private property for private purposes is a private thing."[1] Conversely, a navigation canal constructed by public authorities on a right of way servitude or on public land is certainly a thing of the public domain. Determination of the ownership of the canal, however, does not resolve the issue of public use. The two questions are distinct and distinguishable.

In *Discon v. Saray, Inc.*,[2] a tract of land was traversed by two artificial waterways, found by the court to be navigable in fact. The landowner intended to fill one of the waterways in order to develop his land commercially, and to improve the remaining waterway. Plaintiffs, owners of property upstream, sought an injunction, contending that their access to Lake Pontchartrain was threatened. The Louisiana supreme court held that plaintiffs were entitled to injunctive relief by application of article 97 of the Criminal Code. The court declared that the canal that defendant intended to fill was a dedicated right of way rather than a conventional servitude; in the alternative, even if plaintiffs were merely entitled to a servitude of passage, defendant was not entitled to relocate the right of way by application of article 777 of the Civil Code, because the proposed new location was greatly inconvenient for the owners of the

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1. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 31.5 (Supp. 1972); *cf.* D'Albora v. Garcia, 144 So.2d 911, 915 (La. App. 4th Cir. 1962): "[P]rivate ownership is not inconsistent with the navigability of the body or stream." Harvey v. Potter, 19 La. Ann. 264 (1867).

2. 265 So.2d 765 (La. 1972).

dominant estates. Justice Barham concurred in the result, and Justice Summers filed a vigorous dissent.

According to stipulations and documentary evidence, the canals were defendant's private property. The fact that they contained navigable water within their banks was not sufficient to vest title in the state or to qualify them as things of the public domain. Question arises, however, whether the canals were subject to public use. Public use, likened to a servitude, may arise either by directly applicable provisions of law, as in the case of the use of the banks of navigable rivers, or by dedication, as in the case of roads and streets. Prescription may be relevant only under conditions of article 765 of the Civil Code; in all other contexts, public use is regarded as a discontinuous servitude that may not be established by prescription.

The majority opinion necessarily rests on the assumption that the canal in question was burdened with a servitude of public use. Indeed, it would be inconceivable to apply article 97 of the Criminal Code to a strictly private waterway.[3] The majority proceeded on the idea that this article was applicable because the canal was navigable, and, therefore, was burdened with a servitude of public use; in the alternative, that the canal was burdened with a servitude of public use by virtue of dedication. No one, however, should be prepared to accept the proposition that *all* navigable waterways in Louisiana are subject to public use merely by virtue of the fact they are navigable.[4] A privately owned canal, though navigable in fact, may not be subject to public use, for the same reasons that a private road, though used by commercial traffic, may not be subject to public use. Thus, the disposition of the case would be correct only if the canal in question had been dedicated to public use.

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3. *See* dissenting opinion in Discon v. Saray, Inc., 265 So.2d 765, 775 (La. 1972): "Thus a public navigable waterway is intended to be within the scope of the article, not a private canal, built by private enterprise on private property. . . . It is manifestly absurd to say that a person cannot obstruct a private canal on his private property even if it is navigable. . . . Article 97 will have no bearing upon the rights of the parties in the private canal. Only when the canal is a highway of commerce and a public way does Article 97 come to bear." (Summers, J.)

4. See Yiannopoulos, *The Public Use of the Banks of Navigable Rivers in Louisiana*, 31 LA. L. REV. 563, 567 (1971); Discon v. Saray, Inc., 265 So.2d 765, 775 (La. 1972): "Such a waterway is not a public waterway within the intendment of Article 97, despite the fact that it is clearly navigable and is extensively used by those entitled to the right." (dissenting opinion of Summers, J.). Harvey v. Potter, 19 La. Ann. 264 (1867).

According to Louisiana jurisprudence, the filing of the plat of a subdivision in substantial compliance with the applicable legislation results in *formal* dedication of roads and streets. The majority opinion in the case under consideration may be taken to indicate that the notion of formal dedication extends to navigable canals figuring in a recorded subdivision plat. This may be a plausible idea, but, on account of its novelty, it should not be established by way of dicta. Be that as it may, formal dedication vests in the public the *ownership* of roads and streets.[5] The question whether a subdivider may merely dedicate a servitude of passage over the roads and streets of a subdivision has not been raised in reported cases. Perhaps a subdivider should have this right, although recent decisions seem to indicate that the mere appearance of a road in the recorded subdivision plat results in formal dedication and in vesting of the ownership of the road in the public.[6] In the case under consideration, however, the court apparently assumed that a subdivider may retain the ownership of dedicated roadways, including navigable canals. The latent conflict may have to be clarified in the future.

The court declared that the recordation of the plat along with restrictions and individual titles resulted in the dedication of a right of way, in spite of express provisions in the recorded instruments that were designed to exclude any form of dedication. This may be both a strained interpretation of the instruments in question and an implausible result. It would seem that subdividers should have the right to exclude dedication and the vesting of either ownership or servitude in the public. Indeed, if a subdivider is free to retain the ownership of a roadway, he should be also free to retain unencumbered ownership. The court refrained from deciding whether the dedication was "a public dedication or . . . merely a dedication for the benefit of the property owners of the subdivision."[7] It would seem that the only dedication known to Louisiana law is dedication to public use and that a dedication for the benefit of certain landowners is merely a conventional servitude.

5. *See* Arkansas-Louisiana Gas Co. v. Parker Oil Co., 190 La. 957, 183 So. 229 (1938); Chevron Oil Co. v. Wilson, 226 So.2d 774 (La. App. 2d Cir. 1969); Village of Folsom v. Alford, 204 So.2d 100 (La. App. 1st Cir. 1967); Kemp v. Town of Independence, 156 So. 56 (La. App. 1st Cir. 1934).

6. *See* Chevron Oil Co. v. Wilson, 226 So.2d 774 (La. App. 2d Cir. 1969); *Comment*, 30 LA. L. REV. 583 (1970); *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Property*, 31 LA. L. REV. 196, 201 (1971).

7. Discon v. Saray, Inc., 265 So.2d 765, 770 (La. 1972).

Leaving aside issues of dedication that were not directly raised, the most plausible ground for decision seems to be that defendant failed to make a case for application of article 777 of the Civil Code. Defendant conceded that the land was burdened with a conventional servitude of passage in favor of plaintiff's estates. This servitude could be relocated on a showing that the original location became "more burdensome" for the owner of the servient estate and that the proposed new location was "equally convenient" for the owners of the dominant estates. According to the majority, defendant did not offer an equally convenient location; according to the dissent, defendant satisfied the requirement of article 777 and was entitled to have the servitude relocated. Thus, in the last analysis, the controversy was resolved in the light of factual considerations. For this reason, the majority opinion should have little impact on the development of the Louisiana law of artificial waterways, dedication, and predial servitudes.

NATURAL, LEGAL, AND CONVENTIONAL SERVITUDES

In Louisiana and in France, servitudes may be natural, arising from the natural situation of estates; legal, imposed by law; and conventional, arising from destination of the owner, acquisitive prescription, or juridical act.[8]

Natural Servitudes

According to article 660 of the Civil Code, the estate situated below is bound to "receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude. The proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of the water."[9] Important questions concerning the meaning of these provisions and the scope of the natural servitude of drain were raised in *Poole v. Guste*[10] where plaintiff brought suit for injunctive relief, mandatory and prohibitory, and for damages resulting from the obstruction by

8. *See* LA. CIV. CODE art. 659; *cf.* FRENCH CIV. CODE arts. 640-48; Yiannopoulos, *Predial Servitudes: General Principles; Louisiana and Comparative Law*, 29 LA. LAW REV. 1, 43 (1968).

9. LA. CIV. CODE art. 660; *cf.* FRENCH CIV. CODE art. 640.

10. 246 So.2d 353 (La. App. 1st Cir. 1971).

defendant of a servitude of drain. Plaintiff claimed that he was entitled to a natural servitude of drain under article 660; in the alternative, plaintiff claimed that he was entitled to the same servitude by acquisitive prescription under articles 709 and 765 of the Civil Code. The court of appeal found that defendant's estate was situated below, and that plaintiff's estate was therefore entitled to a natural servitude of drain. The court refrained from reaching a decision as to the existence of a conventional servitude of drain, but the tenor of the opinion suggested that such a servitude existed. The Louisiana supreme court granted certiorari[11] and affirmed.[12]

Justice Tate, writing for the majority, accepted the lower court's findings of facts and proceeded to a masterful analysis of pertinent questions of law. His opinion deserves attention because it clarifies the application of certain provisions of the Civil Code and indicates areas that will require clarification in the future. The court expressly refrained from deciding the following matters:

1. Whether the existence of a conventional servitude precludes the acquisition by prescription of a different or more extensive continuous and apparent servitude. The court correctly noted, however, that there is French authority for an affirmative answer and that articles 797 and 800 of the Louisiana Civil Code lead to the same conclusion.

2. Whether a continuous and apparent servitude may be acquired merely by ten years simple unopposed use under article 765 or whether thirty years use is required for acquisitive prescription without title under article 3504. It was in part the desire of the court to clarify this quesiton that promped the grant of certiorari. This question, however, was not raised under the facts and pleadings, and the court wisely avoided determination by way of dicta.

3. Whether the modification of a natural servitude of drain by works changes its nature and converts it into a conventional servitude by prescription. It would seem that the answer to this question depends on facts and circumstances, and that quantitative changes may indeed result in qualitative differentiation.

11. 258 La. 760, 247 So.2d 861 (1971).
12. 261 La. 1110, 262 So.2d 339 (1972).

Material modifications may thus result in the acquisition of a conventional servitude; insubstantial modifications may be merely modes of use of a natural servitude.

The court did decide that article 660 of the Civil Code does not contemplate an estate that is *overall* higher to another. The natural servitude of drain thus follows individual patterns along particular points of the boundary; namely, it attaches to points where one estate is upper to the other. This is the only plausible interpretation of article 660 in the light of its purpose. Unfortunately, little guidance may be gained in this field from contemporary French doctrine and jurisprudence, for the simple reason that the corresponding article of the French Civil Code has been modified by substantial water legislation.[13] Such legislation is certainly needed in Louisiana, but until it is enacted courts will have to resort to the Civil Code, reason, and common sense. French commentators of past generations did not take care to define the terms "upper estate" and "lower estate." This may be so because in France most estates are small, the terrain is ordinarily uneven, and the water flows in an easily ascertainable single direction. In Louisiana's flatlands, however, relative overall elevation of two estates is not an easy matter to determine even by scientific methods, and the most reliable guide remains the flow of the waters.[14] The existence of large estates and the possibility of reciprocal flows depending on slightest differences of elevation, make it apparent that overall height is and ought to be immaterial. It is submitted that the pertinent articles of the Civil Code must be applied in accordance with common sense and reason, without resorting to involved scientific calculations. Denial of a natural servitude at a particular point for the reason that overall elevation is lacking would certainly upset natural flows and would render cultivation and irrigation uneconomic in many cases. The purpose of the natural servitude of drain is to maintain the status quo as it exists in nature,[15] and this is accomplished by recognizing the

13. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 502 (2d ed. 1952).

14. *See, e.g.*, Broussard v. Cormier, 154 La. 877, 98 So. 403 (1923); Brown v. Blankenship, 28 So.2d 496 (La. App. 2d Cir. 1946).

15. *See* XI DEMOLOMBE, TRAITÉ DES SERVITUDES 25 (1876): "[T]he legislator has intervened in the private interest of the owners and in the general interest of society, not to create a servitude but to give effect to the natural situation of the places, so that each is bound to conform with it and to maintain it."

existence of a natural servitude of drain in individual points.

The court also decided that servitudes may be enforced in Louisiana by mandatory and prohibitory injunctions, without regard to historical limitations developed by the chancery court. Thus, to the extent that property rights are protected by real actions, the "clean hands" limitation is without application. Further, in the light of Louisiana's "different civilian procedural background," an injunction lies even if damages are an adequate remedy, because "injunction has historically been recognized as a remedy available to protect possession of property . . . including . . . the continued use of a servitude of drain over another's land."[16] Balancing of the equities is "inappropriate"[17] in cases in which substantial damage has been caused and there has been substantial interference with the use of property.

The court rejected defendant's propositions that the owner of the dominant estate may not claim relief if he can achieve drainage by means of works on his own land, and that the owner of the servient estate may protect his works from tidal flow by means of works that cause damage to his neighbor. The first proposition is, of course, contrary to well-settled jurisprudence.[18] The second proposition deserves discussion. In a dissenting opinion, Justice Summers suggested that article 660 should not apply to marshlands overflowed by tides, and that the owner of such lands should have the right to protect his property by means of dikes, even if the works cause the waters to back up. Early French commentators elaborating on article 640 of the French Civil Code, corresponding with article 660 of the Louisiana Civil Code of 1870, developed the idea that the prohibition of works does not apply to rivers and streams. Thus, a landowner may construct dams on his property, although these dams may cause rain water to back up and to inundate neighboring property.[19] By analogy, it may be said that article 660 should not apply to lands threatened by tidal overflow and that dikes might be erected that cause rain waters to back up into the dominant

16. Poole v. Guste, 261 La. 1110, 1126-27, 262 So.2d 339, 345 (1972). *See also* Broussard v. Cormier, 154 La. 877, 98 So. 403 (1923).

17. 261 La. at 1126-27, 262 So.2d at 345.

18. *See* Nicholson v. Holloway Planting Co., 255 La. 1, 229 So.2d 679 (1969); Broussard v. Cormier, 154 La. 877, 98 So. 403 (1923); Brown v. Blankenship, 28 So.2d 496 (La. App. 2d Cir. 1946).

19. *See* XI DEMOLOMBE, TRAITÉ DES SERVITUDES 34 (1876); *cf.* Mailhot v. Pugh, 30 La. Ann. 1359 (1878).

estate. This analogy, however, would not be applicable to *all* marshlands. According to Demolombe, "the estates adjacent to a marsh are bound to receive the waters that overflow as a result of rain; and it is well-understood that the owners of inferior estates or neighbors cannot free themselves of this natural servitude by means of works which cause the waters to back up into superior estates or to estates of the same elevation."[20] In case of Code revision or enactment of comprehensive water legislation, attention should be focused on considerations of utility and on the most economic methods for assuring drainage and agricultural exploitation of marshlands.

Legal Servitudes

Articles 667-69 of the Civil Code establish certain limitations on the content of the right of ownership which have been qualified by the redactors as "servitudes" imposed by law.[21] Article 667 declares that although an owner may do with his estate whatever he pleases, "he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him." The following article 668 declares that an owner may nevertheless do "on his ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor." Article 669, the third in the series, declares that if works or operations cause inconveniences by the diffusion of smoke or odors, "and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place."

Thus, article 667 prohibits works which cause damage or deprive neighbors of the enjoyment of their property; article 668 allows works which merely cause "some inconvenience"; and article 669 indicates that, in the absence of a conventional servitude, inconveniences resulting from the diffusion of smoke or odors[22] may be tolerated or suppressed, depending on police regulations or local custom. Admittedly, lines of demarcation

20. XI DEMOLOMBE, TRAITÉ DES SERVITUDES 33 (1876).

21. *See* LA. CIV. CODE art 664; Yiannopoulos, *Predial Servitudes: General Principles; Louisiana and Comparative Law*, 29 LA. L. REV. 1, 44 (1968).

22. The reference to smoke or odors in article 669 is merely illustrative. *See* Robichaux v. Huppenbauer, 258 La. 139, 155, 245 So.2d 385, 391 (1971) (concurring opinion of Barham, J.).

are not clearly drawn among works that cause damage or deprive a neighbor of the enjoyment of his property and inconveniences that fall short of that test and, therefore, must be tolerated. Further, no clear line of demarcation is drawn between inconveniences that must be tolerated under article 668 and inconveniences that may or may not be tolerated under article 669. Perhaps, the redactors of the code wanted to establish the following principles. No one may use his property so as to cause damage to another or to interfere substantially with the enjoyment of another's property (article 667). Landowners must necessarily be exposed to some inconveniences arising from the normal exercise of the right of ownership by a neighbor (article 668). But excessive inconvenience, such as those caused by the diffusion of industrial smoke, odors, or noise, need not be tolerated in the absence of a conventional servitude; whether an inconvenience is excessive or not is to be determined in the light of police regulations and local customs (article 669). Be that as it may, the interpretation and application of these articles tends to become a *cause célèbre* in Louisiana.

Articles 667-69 have been applied by Louisiana courts together with the common law of nuisance to grant relief in cases in which use of property causes damage or excessive inconvenience to neighbors.[23] It was, perhaps, natural for Louisiana courts in the past to seek guidance in common law precedents. French doctrine and jurisprudence could furnish little guidance in this field, because the French Civil Code does not contain corresponding articles.[24] The common law of nuisance, on the other hand, was supposed to reflect applications of the *sic utere* doctrine, the same doctrine that articles 667-69 embody. In recent years, however, critical analysis has demonstrated that in spite of similarities of underlying doctrine, the structure and function of the law of nuisance is substantially different from

23. *See* Robichaux v. Huppenbauer, 258 La. 139, 245 So.2d 385, 389 (1971).

24. *See* Froelicher v. Southern Marine Works, 118 La. 1077, 1086, 43 So. 882, 885 (1907): "Our researchers in French jurisprudence have not enabled us to find a pertinent decision. We infer that there are not many decisions in France upon the subject, for the reason that that particular matter is left in great part to municipal regulation, and not to private suits for damages." *See also* Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919). It should be noted, however, that modern French jurisprudence has developed rules corresponding to those established by LA. CIV. CODE arts. 667-69. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 450-67 (2d ed. 1952); 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 282 (7th ed. 1961).

the structure and function of legal servitudes. Indeed, the law of nuisance is a branch of the common law of torts whereas the legal servitudes are institutions of the civil law of property.[25] Accordingly, the modern trend in Louisiana jurisprudence calls for direct application of the provisions of the Civil Code and for use of common law precedents selectively as illustrations of acceptable practical solutions.[26] The Louisiana supreme court has repeatedly declared that in this field of property law "while . . . common-law authorities . . . may be persuasive, they are not decisive of the issue in view of our codal articles and jurisprudence."[27] It is submitted that continued reliance on the common law of nuisance in the framework of civil law property institutions is unnecessary and confusing. Louisiana courts are in a position to develop the practical implications of articles 667-69 in the light of contemporary exigencies, relying on civilian methodology and on the accumulated gloss of Louisiana jurisprudence.

In *Hilliard v. Shuff*,[28] a landowner sued the lessee[29] of adjoining property, owner and operator of a service station, to compel him to remove or place underground certain fuel tanks.

25. *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Property*, 31 LA. L. REV. 196, 223 (1971). Moreover, the notion of nuisance remains undefined and undefinable in common law jurisdictions. *See* W. PROSSER, TORTS § 87, at 592 (3d ed. 1964): "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem . . . ."

26. *See* Hilliard v. Shuff, 260 La. 384, 390, 256 So.2d 127, 129 (1971) ("These code articles [667-69] control the disposition of the case."); Borenstein v. Joseph Fein Caterers, Inc., 255 So.2d 800, 803 (La. App. 4th Cir. 1971) ("The obligations of proprietors toward one another are prescribed by [Civil Code] arts. 666-669."); Rayborn v. Smiley, 253 So.2d 664, 665 (La. App. 1st Cir. 1971) ("The applicable law is found in Articles 666-669 of the Civil Code.").

27. Frederick v. Brown Funeral Homes, Inc., 222 La. 57, 89, 62 So.2d 100, 111 (1952); *cf.* Barrow v. Gaillardanne, 122 La. 558, 571, 47 So. 891, 896 (1908): "The common law authorities relied on by the defendants have no application to the present case." *See also* Milne v. Davidson, 5 Mart. (N.S.) 408 (La. 1827).

28. 260 La. 384, 256 So.2d 127 (1971).

29. Question has arisen whether article 667-69 of the Civil Code impose obligations on *lessees* or only on owners. *See* Borenstein v. Joseph Fein Caterers, Inc., 255 So.2d 800 (La. App. 4th Cir. 1971); Burke v. Besthoff Realty Co., 196 So.2d 293 (La. App. 4th Cir. 1967). In *Hilliard v. Shuff*, 260 La. 384, 256 So.2d 127 (1971), the Louisiana supreme court proceeded on the assumption that articles 667-69 impose obligations on lessees as well as on owners.

The tanks were located above-ground within five feet of plaintiff's property; they were designed for the storage of crude oil, but were used by defendant for the storage of much more volatile gasoline and diesel fuels. As a result of such use, fumes that could be ignited by random sparks escaped from the tanks and created a zone of danger extending well into plaintiff's property. Plaintiff contended that the maintenance of the tanks deprived him of the use of 45 feet of his property and posed a threat to his residence in violation of articles 667-69.

Justice Sanders, writing for the majority of the court, agreed that "[t]hese code articles control the disposition of the case"[30] and proceeded to an interpretation that deserves attention. According to the court,

> "[t]he storage of basic fuels, a lawful activity, does not, without more, violate these articles. . . . When, however, the storage of fuel creates a substantial hazard to the adjoining property, the use of the property runs counter to the code articles. In determining whether the storage creates a substantial hazard to the adjoining property, the court must consider such factors as location, structure of the storage tanks, quantity of fuel stored, operational procedures, as well as the surrounding circumstances."[31]

In the light of these considerations and pertinent evidence, the court concluded that articles 667-69 had been violated by defendant's use of crude oil tanks for the storage of gasoline and diesel fuel within a few feet of plaintiff's property. Nevertheless, the court was not prepared to grant the relief that plaintiff requested. According to the majority, the violation of the code articles relating to the use of property "requires no automatic injunction to remove the tanks . . . . Injunction is an equitable remedy and should be carefully designed to achieve the essential correction at the least possible cost and inconvenience to the defendant."[32] Since the record failed to reflect whether some correction short of removal or underground placement was feasible, the case was remanded to the trial court for reception of further evidence relative to methods of correction.

Justice Barham dissented. He disagreed both with the dis-

30. Hilliard v. Shuff, 260 La. 384, 390, 256 So.2d 127, 129 (1971).
31. *Id.*
32. *Id.*

position of the case and with the reasoning of the majority opinion. According to Justice Barham, articles 667 and 669 contemplate distinct and distinguishable situations. Article 667 establishes a servitude; hence, in case the servitude is interfered with, the owner of the servitude is entitled to total relief in the form of a permanent injunction: "The only requirement is an *objective finding* of probability that the owner of the dominant estate may at some time be deprived of enjoyment of his property or suffer damage because of the work made upon the servient estate."[33] Article 669, on the other hand, does not establish a servitude; it merely affords relief "after proof of subjective inconvenience." Since the evidence did not establish a finding that the plaintiff had in fact been disturbed in any manner in the enjoyment of his estate or has even been inconvenienced, he was not entitled to any relief under article 669. He was, nevertheless, entitled "to immediate and full abatement of the encroachment upon his legal servitude under article 667."[34]

Justice Barham had sought to develop a rational scheme for interpretation and application of articles 667-69 in combination with article 2315. This scheme emerges in its entirety only from the study of a series of opinions rendered in recent years, because judges do not have the opportunity to write decisions in the form of a leading article; the development of the doctrine from the bench is gradual and interstitial. The outlines of Justice Barham's scheme are as follows. Article 2315 establishes a rule of delictual responsibility; it grants recovery for damage occasioned through fault. The notion of fault, however, does not include merely negligence and intentional misconduct; it also includes responsibility for ultra-hazardous activities.[35] Article 667, establishing a predial servitude, contains a rule of property law. This article grants recovery to the owner of the dominant estate for damage caused to his property by means of "works"[36] on neighboring property without regard to fault. It also authorizes injunctions for the complete abatement of works that interfere with the servitude.[37] The principle of lia-

33. *Id.* at 396, 256 So.2d at 131.
34. *Id.* at 398, 256 So.2d at 132.
35. *See* Langlois v. Allied Chemical Corp., 258 La. 1067, 249 So.2d 133 (1971).
36. *See* Reymond v. State, Dep't of Highways, 255 La. 425, 231 So.2d 375 (1970).
37. *See* Hilliard v. Shuff, 260 La. 384, 392, 256 So.2d 127, 130 (1971) (dissenting opinion).

bility without fault that this article establishes is essential for an expansive interpretation and application of article 2315. Indeed, it is by an analogy from article 667 that article 2315 is applicable to ultra-hazardous activities. Article 669 establishes an obligation of vicinage rather than a servitude; accordingly, it grants relief to any person seriously inconvenienced in the enjoyment of property. Action may thus be brought for damages and injunction by anyone against anyone, without the limitations inherent in article 667. Injunctive relief, however, is authorized only to the extent that works or activities cause serious inconveniences.[38] This scheme has the advantages of simplicity and rigorous logical consistency. It is based on civilian methodology and renders superfluous any reference to the common law of nuisance. If Louisiana courts had the opportunity for a fresh start, the merits of this scheme ought to be seriously considered. The Louisiana Civil Code of 1870, however, ought to be interpreted in the light of its historical sources, and one has to cope with the gloss of jurisprudence that has grown around its provisions. Article 667 contemplates damage caused by both acts and works;[39] and the inconveniences to which article 669 refers may derive from both acts and works.[40] And if article 667 establishes a servitude, it would seem that so does article 669, albeit by virtue of police regulations and local customs rather than by legislation.

If Justice Barham's premise were granted, namely, that article 667 establishes a veritable predial servitude, it ought to follow that any interference with that servitude ought to be abated by permanent injunction. According to contemporary doctrine, however, article 667 establishes merely a limitation on the content of the right of ownership, as does article 669.[41] This limitation is an expression of an *obligation* of vicinage and is *likened* to a servitude. According to Louisiana *jurisprudence constante*, the violation of articles 667-69 does not necessarily give rise to an absolute injunction for the suppression of works or activities on neighboring estates. As a rule, it is only unlaw-

38. *See* Robichaux v. Huppenbauer, 258 La. 139, 155, 245 So.2d 385, 391 (1971) (concurring opinion).

39. *See* Chaney v. Travelers Insurance Co., 259 La. 1, 249 So.2d 181 (1971).

40. *See* LA. CIV. CODE art. 669: "If the *works* or materials from any manufactory or other *operation* . . . ." (Emphasis added.)

41. *See* Yiannopoulos, *Predial Servtiudes: General Principles; Louisiana and Comparative Law*, 29 LA. L. REV. 1, 44 (1968).

ful works or activities that may be totally abated.[42] A lawful business may not be totally abated, even if it causes damage or annoyance to neighbors.[43] Neighbors may be entitled to recover damages for the prejudice they have suffered, and may obtain injunctions designed to minimize inconveniences and to correct the manner in which the business is conducted.[44] In the case under consideration, the placement of above-ground fuel storage tanks near plaintiff's property was a legitimate exercise of a right in the pursuit of a lawful business. The mere presence of the storage tanks did not violate articles 667-69 of the Civil Code;[45] it was the manner in which the tanks were used that created the zone of danger. Accordingly, an injunction would be the appropriate remedy for the correction of the improper use of the tanks. This was accomplished by the majority decision.

Justice Barham's view that an injunction for the removal of the storage tanks ought to be granted might find support, apart from articles 667-69, in the articles of the Civil Code dealing with new works[46] and in articles 3601 and 3663 of the Louisi-

42. *See, e.g.*, cases involving abatement of business conducted in violation of ordinances: State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); State v. Judge, 29 La. Ann. 870 (1877); City of New Orleans v. Lambert, 14 La. Ann. 247 (1859); Kennedy v. Phelps, 10 La. Ann. 227 (1855). In two cases, however, the operation of a business establishment was enjoined, even in the absence of any ordinance. *See* Roche v. Roumain, 51 So.2d 666 (La. App. Orl. Cir. 1951); Talbot v. Stiles, 189 So. 469 (La. App. 2d Cir. 1939).

43. *See, e.g.*, Robichaux v. Huppenbauer, 258 La. 153, 245 So.2d 385 (1971); McGee v. Yazoo, & M.V.R. Co., 206 La. 121, 19 So.2d 21 (1944); Di Carlo v. Laundry & Dry Cleaning Serv., 178 La. 676, 152 So. 327 (1933); Labasse v. Platt, 121 La. 601, 46 So. 665 (1908); Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821 (1903); Koehl v. Schoenhausen, 47 La. Ann. 1316 (1895); Scott v. LeCompte, 260 So.2d 345 (La. App. 1st Cir. 1972); Rayborn v. Smiley, 253 So.2d 664 (La. App. 1st Cir. 1972).

44. *See* Beauvais v. D.C. Hall Transport, 49 So.2d 44 (La. App. 2d Cir. 1950) (injunction restraining the operation of a freight terminal in such a manner as to cause excessive inconvenience to neighbors); Galouye v. A.R. Blossman, Inc., 32 So.2d 90 (La. App. 1st Cir. 1947) (damages awarded to plaintiffs who were prejudiced by the operation of a filling station and by the haphazard handling of dangerous fuels).

45. *Cf.* Blanc v. Murray, 36 La. Ann. 162 (1884). In this case, action was brought by neighbors to compel defendant to remove from his premises an inflammable wooden structure used for the storage of large quantities of pine and cypress lumber. The court found that the danger of fire was real. Nevertheless, the court refused to issue a mandatory injunction for the removal of the structure, because defendant's occupation was lawful and the structure was not in itself the source of danger. The danger arose from the manner in which defendant's business was conducted, and, accordingly, the court issued a prohibitory injunction designed to correct the situation. *See also* Fuselier v. Spaulding, 2 La. Ann. 773 (1847) (injunction prohibiting the burning of a brick kiln on neighboring property).

46. *See* LA. CIV. CODE arts. 856-69.

ana Code of Civil Procedure. For various reasons, these were not the vehicles chosen by plaintiff for the relief he sought. Article 3601 of the Code of Civil Procedure declares that "an injunction shall issue where irreparable injury, loss, or damage may otherwise result to the applicant." It would seem that, even under this article, plaintiff could merely obtain, on proper showing, an injunction for the suppression of the cause of danger, that is, an injunction designed to correct the improper use of the tanks. Article 3663 affords injunctive relief "to a person disturbed in the possession . . . of immovable property or of a real right." The disturbance of possession contemplated by this article may be either a disturbance in law or a disturbance in fact. Clearly, there was no disturbance in law, and it is questionable whether there can be a disturbance in fact without physical invasion of property.

In *Borenstein v. Joseph Fein Caterers, Inc.*,[47] an owner and his lessee brought suit for injunction and damages against an adjacent owner and his lessee. Plaintiffs complained that defendants' raised planter caused moisture to accumulate and deteriorate the base of a common wall and that a large vine caused damage to plaintiffs' roof and walls. The disposition of the case by the trial court gave rise to a number of important issues on appeal, and Judge Lemmon undertook to discuss and resolve these issues with admirable clarity and compelling logic.

The first question before the court was the propriety of an injunction restraining defendant landowner from continuing to maintain the raised planter in such a manner as to cause accumulation of moisture on the walls of the adjoining property and from continuing to maintain the vine in such a manner as to grow over the property onto plaintiffs' premises. The court noted certain indications of "flux" in the jurisprudence of the supreme court as to the basis of the suit, but declared emphatically that "the obligations of proprietors toward one another are prescribed by C.C. art. 666-669."[48] These articles establish the principle that "otherwise lawful conditions may be abated, if the conditions result in material injury to neighboring property or interfere with the comfortable use and enjoyment of that

47. 255 So.2d 800 (La. App. 4th Cir. 1972).
48. *Id.* at 803.

property by persons of ordinary sensibilities."[49] The court used the word "nuisance" throughout the opinion as a descriptive term that denotes violations of the obligations of vicinage rather than in its technical common law sense.[50] Of course, no one may quarrel with this usage. On the basis of all available evidence, the court concluded that the raised planter and the vine offended the principles of the Civil Code; hence, injunctions were properly issued. Defendants' argument that irreparable injury must be pleaded and proved to warrant injunctive relief was dismissed with the declaration that "this is not necessary in a suit to abate a nuisance."[51]

This requires comment. Cases may be found in which Louisiana courts have declared that injunctive relief is available only if a nuisance causes "material, substantial, and irreparable injury to a nearby property owner, for which there is no adequate remedy at law"[52] and that "where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable."[53] It is submitted that these cases confuse the requirements for injunctive relief in general with the requirements for injunctive relief under articles 667-69 of the Civil Code. Under article 3601 of the Code of Civil Procedure, injunctive relief is indeed predicated on a showing of "irreparable injury, loss, or damage,"[54] and equitable considerations of disproportionate hardship might be relevant under this provision. Articles 667-69 of the Civil Code, however, afford injunctive relief designed to secure the comfortable enjoyment of property by persons of ordinary sensibilities. The obligations of vicinage are likened to servitudes, and, as servitudes, they are enforced

49. *Id.* at 804.

50. *Id.*: "Nuisance is a very comprehensive term which is not and should not be the subject of technical definitions or rigid rules. The law in this area should be expansive so as to provide for fair and reasonable results under all the circumstances of each individual case."

51. *Id.* at 805.

52. Robertson v. Shipp, 50 So.2d 699 (La. App. 2d Cir. 1951).

53. Young v. International Paper Co., 179 La. 803, 810, 155 So. 231, 233 (1934). *See also* Gibson v. City of Baton Rouge, 161 La. 637, 109 So. 339 (1926).

54. LA. CODE CIV. P. art. 3601.

by injunctions upon a showing of interference with the lawful enjoyment of property.[55]

The trial court had maintained defendants' exception of improper cumulation of actions and had required plaintiffs to elect between the abatement suit and the damage suit. Upon plaintiffs' election to proceed in abatement, the trial court dismissed the damage suit without prejudice. On appeal, plaintiffs assigned as error the maintaining of the exception of improper cumulation of actions which resulted in the dismissal of their damage suit. The court of appeal refused to pass on the merits of plaintiffs' argument, because the judgment dismissing the suit for damages was a final judgment that had not been appealed. An appeal from that judgment should have been successful. The trial court was clearly in error, because according to a long line of Louisiana decisions actions for abatement and for damages may be cumulated.[56]

Plaintiffs' suit against the defendant lessee was dismissed by the trial court, apparently on the authority of *Burke v. Besthoff Realty Co.*[57] which held that the word "proprietor" in article 667 does not include a lessee. On appeal, the court indicated its reluctance to follow the restricted view expressed in the *Burke* case, and declared its belief "that the liability of a party as proprietor under C.C. art 667 in a nuisance and damage case should be determined on the basis of his responsibility for the existence of the condition which constitutes the nuisance."[58] The dismissal of the suit against the lessee was affirmed, however, because the lessee had not actively participated or contributed to the condition which caused plaintiffs' damages.

55. *See* Poole v. Guste, 261 La. 1110, 1127-28, 262 So.2d 339, 345 (1972): "The relegation of a landowner to compensatory damages instead of to injunctive relief for violation of his property right was permitted, so far as we know, in only the two cited cases concerning very exceptional situations . . . and never so as to deny protection of a servitude due by a servient estate to a dominant estate."

56. *See, e.g.*, O'Neal v. Southern Carbon Co., 216 La. 96, 43 So.2d 230 (1949); McGee v. Yazoo & M.V.R. Co., 206 La. 121, 19 So.2d 21 (1944); Di Carlo v. Laundry & Dry Cleaning Serv., 178 La. 676, 152 So. 327 (1933); Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821 (1903); Rayborn v. Smiley, 253 So.2d 664 (La. App. 1st Cir. 1972).

57. 196 So.2d 293 (La. App. 4th Cir. 1967). *But see* Scott v. LeCompte, 260 So.2d 345 (La. App. 1st Cir. 1972); Parker v. Harvey, 164 So. 507 (La. App. 2d Cir. 1935); *cf.* Daigle v. Continental Oil Co., 277 F. Supp. 875 (W.D. La. 1967); Arrington v. Hearin Tank Lines, 80 So.2d 167 (La. App. 2d Cir. 1955).

58. Borenstein v. Joseph Fein Caterers, Inc., 255 So.2d 800, 806 (La. App. 4th Cir. 1972). *See also* Hilliard v. Shuff, 260 La. 384, 256 So.2d 127 (1971), and text at note 42 *supra*.

Conventional Servitudes

Conventional servitudes are those arising from destination of the owner, acquisitive prescription, or juridical acts.[59] These servitudes are ordinarily protected by real actions in accordance with the provisions of the Louisiana Code of Civil Procedure.[60]

In *Louisiana Irrigation & Mill Co. v. Pousson*,[61] plaintiff filed suit under article 3663(2) of the Code of Civil Procedure to enjoin defendant from interfering with the possession of a servitude for a lateral irrigation canal. This article requires that plaintiff be in possession for more than a year prior to disturbance, and question arose whether plaintiff had met this requirement. The evidence showed that plaintiff possessed the canal for many years prior to 1967. In that year, defendant used for his own irrigation purposes the portion of plaintiff's canal that was located on defendant's land. Defendant again used plaintiff's canal, during the irrigation season, in 1968. Plaintiff began using his canal on defendant's property on May 12, 1969, and continued doing so during the entire irrigation season. On March 20, 1970, defendant cut the levee of plaintiff's canal and began pumping water from his own well into plaintiff's canal. On June 4, 1970, plaintiff filed suit to enjoin defendant from using any portion of the canal, and the trial court granted a preliminary injunction. On appeal, the court reversed and remanded the case to the trial court for determination of defendant's claims for damages and attorney fees. In a scholarly opinion, Judge Culpepper declared that the real actions of the Code of Civil Procedure afford remedies for the protection of possession as well as of the quasi-possession of incorporeals; that continuous and apparent predial servitudes are susceptible of quasi-possession and, therefore, they are protected by the possessory action and by injunction; and that since the canal in question was an aqueduct, a continuous and apparent servitude, article 3663(2) of the Code of Civil Procedure was applicable. Plaintiff, however, was not entitled to injunctive relief under this

59. *See* LA. CIV. CODE arts. 743, 765, 767-69, 3504; Yiannopoulos, *Predial Servitudes: General Principles; Louisiana and Comparative Law*, 29 LA. L. REV. 1, 43 (1968).

60. *See* LA. CODE CIV. P. arts. 3651-753; A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 120, 135-48 (1966).

61. 252 So.2d 151 (La. App. 3d Cir. 1971).

article because he failed to prove that he had possessed the servitude for over a year prior to the disturbance of March 20, 1970. The court noted that defendant had possessed the servitude in 1967 and 1968 during the irrigation season only, namely, from March through July, and that argument might be made that plaintiff had not lost possession by usurpation that had lasted for more than a year.[62] The argument was answered by the observation that possession during the irrigation season was the only kind of possession of which the servitude was susceptible.[63] The Louisiana supreme court granted certiorari[64] and affirmed.[65]

Justice Dixon, writing for the majority, rendered an opinion that deserves attention for its clarity, logic, and methodology. The court agreed that article 3663(2) was applicable to the case, and that defendant had in fact usurped plaintiff's possession under the terms of article 3449 of the Louisiana Civil Code. Further, the court accepted the proposition that the canal in question constituted a continuous and apparent servitude, being the view most favorable to plaintiff. The court, however, refrained from deciding by way of dicta a number of important questions that were not propely before it, including the question whether a rice irrigation lateral canal is an aqueduct or other continuous apparent servitude, or even a predial servitude of any kind. In an appendix, the court correctly indicated that the determination of the nature of the right is not necessarily as simple as maintained by plaintiff. The court noted, for example, that plaintiff was not the owner of the estate benefited by the canal servitude and carefully pointed out that the servitude might well be discontinuous, in which case it might not be susceptible of possession and protection by injunction under article 3663 of the Code of Civil Procedure.

Justice Barham dissented, pointing out that there was no evidence to indicate that defendant possessed the canal as owner, and that there was sufficient evidence for the classification of defendant as a precarious possessor. Further, he pointed out that, in the light of local customs and the conditions of rice farming, irrigation canals are not constantly in use; plaintiff had

62. *See* LA. CIV. CODE art. 3449.
63. *Id.* art. 3432(2).
64. 259 La. 929, 253 So.2d 378 (1971).
65. 265 So.2d 756 (La. 1972).

been continuously in possession, having always used his canal in accordance with the purpose for which it was established; therefore, he was entitled to the relief he claimed.

The court correctly refrained from passing on the nature of the right in question. This right could, indeed, be a personal obligation, a veritable predial servitude, or a sui generis real right in the nature of a limited personal servitude.[66] If it were a limited personal servitude, article 3663(2) could be applicable by analogy. It ought to be noted that defendant did not claim that he was entitled to possession nor did he claim relief under article 3663(2), which would require a showing of possession as owner for a period in excess of one year. The issue before the court was whether plaintiff had been in possession for over a year prior to March 20, 1970, and this issue was resolved against plaintiff. The disposition of the case leaves room for plaintiff to bring a petitory action.

In *Armstrong v. Red River, Atchafalaya & Bayou Bouef Levee Board*,[67] the court faced the question of the proper interpretation and application of article 798 of the Civil Code. In the year 1949 plaintiff had granted defendant, by written instrument, a "servitude" for levee purposes. The instrument granted defendant "the right to use all or any part of the above described property for any purpose with, or connected with construction or excavation of canals or ditches, storage or placement of spoil or spoil dirt, storage or placement of any and all machinery and/or equipment, irrigation, storage or empounding of water, levee construction or relocation and flood control or anything incidental thereto."[68] The levee board promptly constructed a large drainage canal on a portion of the land burdened with the servitude. In 1969, plaintiff filed a suit to cancel the servitude over the part of his land that had not been used by the levee board, claiming that the servitude over that part had been extinguished by non-use in accordance with article 798.

The court of appeal held that the servitude continues to burden the entirety of plaintiff's land. In a scholarly opinion, Judge Domengeaux, writing for the majority, undertook to ex-

66. *See* A. YIANNOPOULOS, PERSONAL SERVITUDES §§ 123-25 (1968).
67. 261 So.2d 298 (La. App. 3d Cir. 1972).
68. *Id.* at 299.

plore the interrelations of articles 790, 791 and 798. The court indicated that article 798, taken alone, lends support to plaintiff's argument of prescription. The court, however, declared that this article "may not be read alone but instead must be considered in conjunction with the other provisions of our law touching on the topic."[69] Having determined that the servitude in question was continuous and apparent, the court noted that the time for the prescription of continuous and apparent servitudes begins to run according to article 790 "from the day any act contrary to the servitude has been committed."[70] Since no acts contrary to the servitude were alleged or proved, the court concluded that prescription had not even begun to run. In a concurring opinion, Judge Culpepper correctly noted that article 798 contemplates prescription of the *mode* of exercise of a servitude rather than partial liberation of the *area* subject to the servitude. The judge found equity in plaintiff's position, but was unable to find any jurisprudential or statutory support for the proposition that article 798 applies to an unused area as distinguished from mode of exercise. Judge Miller dissented on the ground that "articles 797 and 798 both apply to the area upon which a servitude may be exercised and that 798 provides a basis upon which partial prescription of the area of servitude may be rested."[71] The Louisiana supreme court granted certiorari.[72]

Since the requirements of prescription differ with the nature of rights, the first question to be considered is the *nature* of the right of use granted to the levee board. If the right were personal, prescription would begin to run either from the day it ceased being exercised or from the day of its violation, namely, from the day the levee board would have acquired a cause of action for breach of contract.[73] If the right were a veritable predial servitude, prescription would be determined by *direct* application of the provisions of the Civil Code governing extinction of predial servitudes by prescription.[74] And if the right were a sui generis real right likened to a predial servitude, prescription would be determined by *analogous* application of the

69. *Id.* at 300.
70. LA. CIV. CODE art. 790.
71. 261 So.2d at 310.
72. 263 So.2d 44 (La. 1972).
73. *See* LA. CIV. CODE arts. 3528, 3544.
74. *See* LA. CIV. CODE arts. 783, 789-804.

provisions of the Code governing predial servitudes.[75] In Louisiana, rights of use of property accorded to utilities, the state or its political subdivisions, and to the general public are regarded as "servitudes," governed by the provisions of the Civil Code, although ordinarily there is no dominant estate in whose favor the servitudes have been established.[76] Of course, according to accurate analysis, real rights of use established in favor of persons rather than estates ought to be qualified as "limited personal servitudes."[77] This qualification would lead to the same practical results, namely, application by analogy of the rules of the Code governing predial servitudes. There is thus ample authority for the classification of the right of use accorded to the levee board as a servitude, and for application by analogy of the provisions of the Civil Code dealing with termination of predial servitudes by the prescription of non-use.

Since the requirements of prescription differ with the *kinds* of servitudes, the next question to be considered is whether the servitude accorded to the levee board is continuous or discontinuous, apparent or non-apparent. According to the title, the servitude was established for flood control, drainage, and irrigation by means of canals, levees, or ditches. The parties contemplated that the whole of the servient estate might be taken for the realization of the purposes for which the servitude was granted. It was of the essence of the servitude that constructions would be made and maintained on the servient estate. In Louisiana and in France, servitudes are classified in the light of their use rather than with reference to constructions which make the use possible.[78] The use of the servitude in question was made by means of a large drainage canal located on a part of the servient estate. The servitude was apparently exercised without any act of man on the servient estate. Whether classified as aqueduct or drain, or as any other species, the servitude in question was continuous and apparent: it was manifested by

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75. *Cf.* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 102 n.188 (1966).

76. *See*, generally, LA. R.S. 19:2, 82, 389; *id.* 12:328; *id.* 38:2334; *id.* 45:64; *id.* 48:833; Tennessee Gas Trans. Co. v. Bayles, 74 F. Supp. 258 (W.D. La. 1947); Tate v. Ville Platte, 44 So.2d 360 (La. App. 1st Cir. 1950); Arkansas La. Gas Co. v. Cutrer, 30 So.2d 864 (La. App. 2d Cir. 1947).

77. *See* A. YIANNOPOULOS, PERSONAL SERVITUDES § 125, at 408 (1968).

78. *See* 4 BEUDANT ET LEREBOURS-PIGEONNIÈRE, COURS DE DROIT CIVIL FRANÇAIS 646 (2d ed. 1938); *cf.* Roy v. Roy, 5 La. Ann. 590 (1850); Hale v. Hulin, 130 So.2d 519 (La. App. 3d Cir. 1961).

exterior works and was susceptible of exercise without any act of man on the servient estate.[79]

The court in the case under consideration was squarely presented with the question whether the *partial* use of the *area* subject to a *continuous* and *apparent* servitude preserves the whole of the servitude or only the portion that has been actually used. Article 798 of the Civil Code, taken literally and out of context, seems to indicate that the servitude must be reduced to the portion actually used. This article, however, must be interpreted in combination with other articles and in light of its historical derivation.

Article 798 was first adopted in 1825; it has no equivalent in the French Civil Code. According to the redactors, the source of the provision is: "Domat Part I, book 1, tit. 12, sec. 6, No. 5; Toullier, Vol. 3, No. 700, p. 619."[80] The pertinent passage of Domat reads as follows: "Servitudes are either lost by prescription or they are reduced to what has been preserved by possession during the time that suffices to establish prescription."[81] Domat did not elaborate on this statement. Toullier, however, wrote a whole chapter on the prescription of servitudes and declared: "If I have enjoyed a right less extensive than is given by the title, the servitude, whatever be its nature, is reduced to that which is preserved by possession during the time necessary to establish prescription."[82] This language was taken verbatim in article 794 of the Louisiana Civil Code of 1825, which became article 798 of the Code of 1870.

The redactors of the 1825 Louisiana Code took the passage of Toullier out of context. In context, it is abundantly clear that Toullier speaks of the prescription of the *mode* of exercise of *discontinuous* servitudes. He did not deal with the different problem of the partial prescription of the *area* of the servitude by the prescription of non-use. Further, Toullier makes it clear that the prescription of the mode of exercise of the servitude is pertinent only if the title of the servitude contains *limitations* as to its mode of exercise. He says that

79. *See Yiannopoulos, Predial Servitudes: General Principles; Louisiana and Comparative Law*, 29 LA. L. REV. 1, 34, 41 (1968).

80. 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 91 (1937).

81. DOMAT, LES LOIS CIVILES DANS LEUR ORDRE NATURAL, 1 OEUVRES DE DOMAT 340 (Remy ed. 1828).

82. 2 TOULLIER, DROIT CIVIL FRANÇAIS 206 (1833).

> "if the servitude is not limited by its title . . . it is presumed to be unlimited; then, the use of the servitude made during the night preserves the right to exercise it during the day, because a single act of exercise of the servitude preserves the whole of it, indefinite and unlimited, as it were: because, according to Article 707 [of the French Civil Code which corresponds with Article 790 of the Louisiana Civil Code of 1870] it is from the last day of enjoyment that the prescription begins to run."[83]

Toullier is saying that the question of the prescription of the mode of servitude arises only when there are limitations in the title pertaining to the mode of exercise of the servitude. Article 798 of the Louisiana Civil Code then is applicable *when the title creating a discontinuous servitude establishes limitations as to the mode of exercise*, for example, by night, by day, by carriage, or on foot. If there are no limitations, there is no question of the prescription of the mode of exercise under article 798.

As to continuous servitudes, Toullier never thought that partial use of the area of the servitude would result in partial termination of the servitude. In section 709, Toullier declares: "We must note that servitudes are not extinguished by prescription so long as there are vestiges of works established for their use. These vestiges preserve the right, according to the maxim: *signum retinet signatum* . . . . Thus, a window or an aqueduct preserves the right of servitude although it is not used."[84] In this respect Toullier follows the civilian tradition and applies the principle of the indivisibility of predial servitudes.

Article 656 of the Civil Code establishes the principle that servitudes are indivisible. By virtue of this principle, implicitly adopted in France and in other civil law jursdictions, partial use of a servitude suffices ordinarily to keep the servitude alive as a whole.[85] But, by way of exception to the principle of indivisibility, articles 796-98 allow partial prescription of the mode of exercise of discontinuous servitudes when there are limitations in the title of the servitude. This exception has its origin in the texts of Domat and Toullier. The same exception is estab-

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83. *Id.* at 208.
84. *Id.* at 209.
85. *See* BALIS, CIVIL LAW PROPERTY 335 (3d ed. 1955); GREEK CIV. CODE art. 1138.

lished in article 708 of the French Civil Code which corresponds with article 796 (1) of the Louisiana Civil Code of 1870.

From the viewpoint of policy, argument might be made that partial prescription ought to apply to the mode as well as to the area of the servitude, whether the servitude is continuous or discontinuous, and whether there are limitations in the title or not. To accomplish these ends, article 798 could be applied literally and out of context. The Louisiana supreme court, however, has apparently taken the view that the preferable policy is to favor the preservation of the servitude as a whole, at least when it is established in favor of public utilities or public bodies.[86] In *Hanks v. Gulf States Utilities Co.*,[87] the court followed a rather involved line of reasoning in order to give effect to this policy, and the disposition of the case was fully supported by the provisions of the Civil Code.

Upon conclusion, it is submitted that articles 796-97 of the Civil Code were intended to apply, and do apply, to discontinuous servitudes in cases in which the exercise of the servitude is subject to limitations contained in the title. These articles have no application to continuous servitudes or to discontinuous servitudes in the absence of limitations in the title. Louisiana courts ought to apply these articles as exceptional provisions that are not susceptible of extension by analogy: *exceptio est strictissimae interpretationis.* Domat's rationalism ought to give way to practicalities and to application of the principle of indivisibility of predial servitudes that has been expressly incorporated into the Louisiana Civil Code. The French sought to *restrict* application of article 708 of their Code by resorting to the obstacle theory. In Louisiana, application of articles 796-98 for the purposes for which they were intended is assured by reliance on article 790. In this way, practical results will be the same as in France and in other civil law jurisdictions. And note, French courts sought to restrict the scope of partial non-use even though the period of prescription is thirty years. In Louisiana, where the period of non-use is ten short years, there are additional reasons for a balanced interpretation of articles

86. *See* Hanks v. Gulf States Utilities Co., 253 La. 946, 221 So.2d 249 (1969).

87. 253 La. 946, 221 So.2d 249 (1969); *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Property*, 30 LA. L. REV. 181, 194 (1969).

796-98. It is only such an interpretation that will do justice to the scheme of the Code and to the text of Toullier, the actual source of these provisions.

REAL AND PERSONAL RIGHTS; INJUNCTIVE RELIEF

The Civil Code has incorporated either expressly or by clear implication a number of legal ideas, maxims, and classifications that form the substratum of the civilian tradition. The classification of rights as "personal" or "real" is one of these basic tenets of the Code, established in a number of scattered provisions.[88]

According to traditional civilian doctrine, the contract of predial lease gives rise to personal rights only.[89] This is also the view established by well-settled jurisprudence of the Louisiana supreme court.[90] Having merely a personal right, the predial lessee possesses the property for his lessor rather than for himself;[91] and he does not even enjoy a quasi-possession of the lease, because it is only real rights that are susceptible of quasi-possession.[92] Thus, according to fundamental principles of the Civil Code and of the Code of Civil Procedure, the predial lessee has no standing to bring the possessory action in his own name against persons encroaching on the leased property.[93] Nevertheless, since the lessee has a valuable patrimonial right, he may bring all sorts of personal actions against the lessor or third persons, including actions for damages under article 2315 of the Civil Code and for injunctive relief under the conditions of article 3601 of the Louisiana Code of Civil Procedure.

In *Indian Bayou Hunting Club, Inc. v. Taylor*,[94] the predial

88. *See, e.g.*, LA. CIV. CODE arts. 490, 492, 2012, 3282.

89. *See* POTHIER, TRAITÉ DU CONTRAT DE LOUAGE, 4 OEUVRES DE POTHIER 2 (1861); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 395 (1876); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 95 (1966).

90. *See* Leonard v. Lavigne, 245 La. 1004, 162 So.2d 341 (1964); Harwood Oil & Mining Co. v. Black, 240 La. 641, 124 So.2d 764 (1960); Reagan v. Murphy, 235 La. 529, 105 So.2d 210 (1958); Wolfe v. North Shreveport Devel. Co., 228 So.2d 148 (La. App. 2d Cir. 1969). Exceptionally, in expropriation proceedings, predial leases function as real rights. *See* Columbia Gulf Trans. Co. v. Hoyt, 252 La. 921, 215 So.2d 114 (1968).

91. *See* LA. CODE CIV. P. art. 3656: "A predial lessee possesses for and in the name of his lessor, and not for himself." *See also* LA. CIV. CODE art. 3441 (1870).

92. *See* LA. CIV. CODE art. 3432(2) (1870); 3 PLAINOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 53 (2d ed. Picard 1952).

93. *See* LA. CODE CIV. P. arts. 3655, 3656.

94. 261 So.2d 669 (La. App. 3d Cir. 1972).

lessee of a large tract of land brought action to enjoin the defendants from trespassing on a portion of the leased property. The trial court granted plaintiff's demand, and the Court of Appeal for the Third Circuit affirmed on the ground that article 3663 of the Louisiana Code of Civil Procedure affords injunctive relief to a predial lessee. The court declared that all this article requires is "corporeal possession" and that the possession of the lessee meets this requirement. To bolster its conclusion, the court relied on an interpretation of the historical sources of article 3663, namely, provisions of the Code of Practice and pertinent jurisprudence. In an eloquent concurring opinion, Judge Domengeaux pointed out that the result could be justified only by application of article 3601 of the Code of Civil Procedure and proceeded to a critique of the reasoning of the majority opinion. There is no reason to repeat here the compelling arguments made in the concurring opinion. It suffices to state that the majority opinion tends to blur the distinction between personal and real rights and implicitly conflicts with the jurisprudence that declares predial leases to be personal rights. Further, the majority opinion leads to an undesirable result as it emasculates the provisions of article 3656 of the Code of Civil procedure. Whereas the predial lessee is expressly denied possessory protection by article 3656, the same lessee may accomplish the purposes of the possessory action by the simple expedient of a demand for an injunction under article 3663.[95] Finally, the majority opinion contradicts settled rules of statutory interpretation as it takes article 3663 out of its context and disregards article 3660. This last article declares: "A person is in possession of immovable property or of a real right, *within the intendment of the articles of this Chapter*, when he has the corporeal possession thereof, . . . *and possesses for himself* . . . ."[96] Article 3663 is located within the chapter devoted to real actions and must be applied in combination with article 3660. Accordingly, a predial lessee is not "a person who is disturbed in the possession . . . of immovable property or of a real right" under article 3663,[97] because he has neither possession nor a real right in immovable property.

95. In many instances real rights may be completely protected by injunctive relief alone. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 141 (1966).

96. LA. CODE CIV. P. art. 3660. (Emphasis added.)

97. For a correct application of article 3663, see Davis v. Caluda, 260 So.2d 772 (La. App. 4th Cir. 1972).